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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

NICK CASCIO ..... *Petitioner,*

v. No. 254

STATE OF ARKANSAS ..... *Respondent.*

PETITION FOR WRIT OF *CERTIORARI* TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

KENNETH C. COFFELT,
Counsel for Petitioner.

DEMOCRAT P. & L. CO., LITTLE ROCK

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PETITION FOR WRIT OF *CERTIORARI* TO THE SUPREME COURT OF THE STATE OF ARKANSAS AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

MAY IT PLEASE THE COURT:

The petitioner, Nick Cascio, respectfully represents to this Honorable Court:

A

SUMMARY STATEMENT OF THE MATTERS INVOLVED

July 22, 1947, the prosecuting attorney of Pulaski County for the State of Arkansas, by felony information, jointly charged petitioner, Nick Cascio, and W. F. Strong, with possessing burglary tools (R. 1).

Cascio's separate demurrer and motion to dismiss the information was filed and overruled on October 28, 1947 (R. 2).

Petitioner's motion to quash information was filed and overruled October 28, 1947 ((R. 5).

October 28, 1947, Cascio pleaded not guilty to the information, and was granted, by the trial court, separate jury trial.

At the close of the State's case he moved for a directed verdict of acquittal, which motion was overruled (R. 100). Petitioner was convicted and sentenced to three years in the State penitentiary (R. 7).

Appeal to the Supreme Court of Arkansas was perfected and the verdict and judgment of conviction was affirmed by the Supreme Court (R. 141).

Petition for rehearing was filed in the Supreme Court of Arkansas (R. 147), and was denied by the Court on May 31, 1948 (R. 149).

B

STATEMENT AS TO JURISDICTION

Petitioner contends:

1. That the statute, Section 3063 of Pope's Digest of the Statutes of Arkansas, is in conflict with the Fourteenth Amendment to the United States Constitution.

2. That the information is void and should have been quashed and dismissed, because it conflicts with Amendment V to the United States Constitution.

3. That petitioner was denied the right to exercise for himself the allotted number of peremptory challenges in the selection of the trial jury, in violation of Amendments VI and XIV to the United States Constitution (R. 51-52-53-54 and 58 and 61).

4. That petitioner is being deprived of his liberty, in violation of the Fourteenth Amendment to the United States Constitution, because there is not a single scintilla of evidence of his guilt. He was entitled to a directed verdict of acquittal.

5. That petitioner is being deprived of his liberty, in violation of Amendment XIV to the United States Constitution because of the prosecuting attorney's argument to the jury (R. 139 and 140).

6. The above questions were properly raised by counsel for petitioner in the trial court and before the Arkansas

Supreme Court (R. 147-148-149). A certified copy of Cascio's brief in the Supreme Court of Arkansas has been filed with the Clerk of this Court.

7. The Supreme Court of Arkansas is the highest Court in Arkansas.

C

QUESTIONS PRESENTED

The questions here presented are:

Whether or not petitioner's contentions hereinabove numerically set forth under the heading B of this petition, are well founded.

D

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

It is submitted that the prosecution of petitioner for violation of the State statute involved, upon the information filed by the prosecuting attorney, without the privilege of exhausting for himself the number of peremptory challenges in selecting the jury allowed him, and his conviction without a scintilla of evidence to support the same after a directed verdict had been asked for, followed by abusive argument of the prosecuting attorney, that the Supreme Court of Arkansas has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with the applicable decisions of this Court.

That the matter is substantial, is apparent, because the liberty of the petitioner is at stake.

Wherefore, your petitioner respectfully prays, that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Arkansas, commanding that Court to certify and to send to this Court for its review and determination on a day certain, to be therein named, a full and complete transcript of the record and all proceedings in the case called and entitled on its Docket No. 4487, *State of Arkansas* v. *Nick Cascio,* and that the judgment of the Supreme Court of the State of Arkansas may be reversed by this Honorable

Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

KENNETH C. COFFELT,

Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

October Term, 1948

Nick Cascio.....*Petitioner,*

v. No. .....

State of Arkansas.....*Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

I

OPINION OF COURT BELOW

The opinion of the Supreme Court of the State of Arkansas, which disposed of this case, has not yet been officially reported. It is printed in the record (R. 142).

II

JURISDICTION

1. The jurisdiction of this Court is invoked under Title 28, U. S. C. A. Section 344 (b). The specific claims as to the jurisdiction of this Court are set out in the foregoing petition under the heading "B" and are not repeated here.

2. The judgment of the Supreme Court of the State of Arkansas sought to be reviewed was rendered on May 3, 1948 (R. 141). Subsequently in due time petition for rehearing was filed with the Supreme Court of Arkansas (R. 147). The Supreme Court denied the petition for rehearing May 31, 1948 (R. 149).

3. This judgment of the Arkansas Supreme Court affirms the judgment of the First Division, Pulaski Circuit Court at Little Rock, finding the petitioner guilty (R. 141).

III.

STATEMENT OF THE CASE

The essential facts and issues in the case are given under the headings A, B and D in the foregoing petition, and the interest of brevity are not repeated here.

IV

SPECIFICATIONS OF ERRORS

It is respectfully submitted that the Supreme Court of Arkansas erred:

1. In finding and holding that Section 3063 of Pope's Digest of the Statutes of Arkansas is not repugnant to the Fourteenth Amendment to the United States Constitution.

2. In finding and holding that the information filed by the prosecuting attorney was valid and was not repugnant to Amendment V to the United States Constitution.

3. In finding and holding that petitioner could not exercise for himself his allotted number of peremptory challenges in the selection of the jury, in violation of Amendments VI and XIV to the United States Constitution.

4. In finding and holding that there was some scintilla of evidence of petitioner's guilt, and that he was not entitled to a directed verdict of acquittal, as a matter of law, in violation of the Fourteenth Amendment to the United States Constitution.

5. In failing to find and to hold that the argument of the prosecuting attorney amounted to violation of petitioner's constitutional rights, under Amendment XIV of the United States Constitution.

V

SUMMARY OF ARGUMENT

We shall develop the argument on the specification of errors as numerically set forth under IV of this brief.

VI

A

THE STATUTE IS UNCONSTITUTIONAL

The statute is so vague and indefinite that it fails adequately to give reasonable standards for determining guilt, and fails to give adequate guidance to those who would be law abiding. An interpretation of what the statute might include would be impossible.

Sec. 3063, Pope's Digest of the Statutes of Arkansas;

Musser et al. v. *State of Utah*, U. S. Supreme Court Reporter, March 1, 1948, p. 397, decided on Feb. 9, 1948.

Amendment XIV, U. S. Constitution.

VII

B

INFORMATION CANNOT BE SUBSTITUTED FOR GRAND JURY INDICTMENT

Petitioner was brought to trial in violation of the Federal Constitution, because he was not charged by a grand jury indictment. The grand jury in Arkansas has not been abolished. It is optional with the trial courts whether or not the grand jury functions. The constitutional provision in Arkansas authorizing the prosecuting attorney to indict by information, as a substitute for grand jury indictment, is violative of the Federal Constitution.

Amendment 21, Arkansas Constitution;

Amendments V and XIV, United States Constitution.

VIII

C

RESTRICTION OF PETITIONER'S RIGHTS IN JURY SELECTION UNCONSTITUTIONAL

The laws of Arkansas provide that the defendant in a case of this kind shall have eight peremptory challenges.

There is no Arkansas statute or constitutional provision conflicting therewith. Any court order or rule of practice contrary thereto would be procedural only. The record reveals that the trial court refused defendant's request for certain peremptory challenges, when sufficient number was left for him to exercise (R. 51-52-53-54 and 58 and 61). This was a denial of petitioner's inherent right.

Sec. 18, Initiated Act No. 3, Acts of Arkansas, 1937;

Amendments VI and XIV, United States Constitution.

IX

D

NO EVIDENCE OF PETITIONER'S GUILT, AND DIRECTED VERDICT OF ACQUITTAL SHOULD HAVE BEEN GIVEN AS A MATTER OF LAW

The Arkansas Supreme Court, as it had a right to do if the statute is valid, upheld the declaration of law given the jury by the trial court for the State as the correct basis for a finding on the question of petitioner's guilt (R. 145).

The instruction, in substance, required a finding beyond a reasonable doubt that the "assembly of tools, as such group," are "more nearly suitable for unlawful purposes than for any lawful purpose" (R. 125). There is not a scintilla of evidence in this record under this rule which the Arkansas Court has applied to this statute that establishes petitioner's guilt. All of the testimony, both direct and on cross-examination, shows conclusively that the tools in evidence are the common, ordinary, everyday working tools of people in lawful occupations. The Arkansas Court in its three previous decisions construing the statute has consistently held that the intentions of the one possessing tools in alleged violation of the statute is immaterial, and that the fact that a crime has been or might be committed as a result of the possession of alleged burglary tools is likewise immaterial, or the fact that the tools might be used for unlawful purposes is immaterial. The cold element of possession within itself is the offense. The tools and coat in evidence are in the custody of the Marshal of this Court. The two pinch bars were not in Cascio's possession. They

were not found in his car. The coat in the record, with the name of Strong in it, is not legal evidence, because it is not identified as belonging to the Strong under indictment. No proof is offered to show the distance from Summerfield's to the place Cascio's car was found, and the Supreme Court erred in holding, as a matter of law in cases of this kind, that courts and juries would take judicial notice of this distance (R. 144). Probably some members of the jury were not familiar with the location of Little Rock streets. Juries never take judicial notice of any fact not in evidence. We are aware of the fact that this Court refuses to re-weigh the evidence in conflict in cases of this kind; but, in the case at bar there is the utter lack of any evidence for a fact finding under the trial court's instruction approved by the Supreme Court. Therefore, it becomes a question of law for this Court to decide whether or not Cascio was entitled to a directed verdict of acquittal.

Amendment XIV, United States Constitution;

Satterfield v. *State*, 174 Ark. 733;

Jones v. *State*, 181 Ark. 336;

Prather v. *State*, 191 Ark. 903;

People ex rel. Dixon v. *Lewis*, 290 N. Y. S. 284, 160 Misc. 327;

Lancaster v. *Collins*, 6 S. Ct. 33, 115 U. S. 222, 29 L. Ed. 373;

Baltimore & Carolina Line v. *Redmond*, 295 U. S. 654;

Empire State Cattle Co. v. *A. T. & S. F. Ry. Co.*, 28 S. Ct. 607, 210 U. S. 1, 52 L. Ed. 931.

X

E

PROSECUTING ATTORNEY'S ARGUMENT MAKES TRIAL UNFAIR

The argument of counsel for the State, with objections and exceptions thereto, is highly prejudicial and fails to meet the high standard of ethics or to uphold our basic law (R. 139) and 140).

Amendment XIV, United States Constitution;

Waldron v. *Waldron*, 15 S. Ct. 383, 156 U. S. 361, 39 L. Ed. 453.

XI

CONCLUSION

We can not find where this Court has ever placed any constitutional interpretation on any one of the burglary tool statutes of any State. It will be remembered that the cold possession of the tools is the crime itself, according to the holdings of the Arkansas Court. The element of intent for the possession of the tools and the purpose for which the tools might be used being immaterial. If the statute is valid and if the evidence in the record establishes petitioner's guilt, then hundreds and thousands of people in Arkansas and those passing through the State in automobiles are innocently violating the law every day.

The information can not take the place of grand jury indictment, and the abusive argument of the prosecuting attorney violates petitioner's constitutional rights, as does the Court's denial of his right to exercise his own challenges in the selection of the jury.

Undoubtedly petitioner is being deprived of his liberty without due process of law as guaranteed him by the Federal Constitution. He has not had a fair trial under his constitutional rights.

We respectfully submit that the petition for *certiorari* should be granted.

Respectfully submitted,

KENNETH C. COFFELT,

Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

Nick Cascio ..... Petitioner,

v. No. 376

State of Arkansas ..... Respondent.

REPLY TO PETITION AND BRIEF OF PETITIONER, NICK CASCIO, FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

NICK CASCIO ..... *Petitioner*

v. No. 254

STATE OF ARKANSAS ..... *Respondent*

BRIEF IN REPLY TO PETITIONER'S BRIEF AND PETITION

I

The Statute Is Not Unconstitutional

Under the above heading, petitioner argues that Section 3063 of Pope's Digest of the Statutes of Arkansas for the violation of which he was convicted is unconstitutional.

This Section is as follows:

> "Any person who makes, mends, designs or sets up, or who has in his custody or concealed about his person, any tool, false key, lock pick, bit, nippers, fuse, force screw, punch, drill, jimmy, bit, or any material, implement or other mechanical device whatsoever, adapted, designed or commonly used for breaking into any vault, safe, railroad car, boat, vessel, warehouse, store, shop, office, dwelling house, or door shutter, or window of a building of

any kind, shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than two years, nor more than ten years. Act. February 17, 1915, p. 208."

A conviction under this Statute has been before the Arkansas Supreme Court four times.

Satterfield v. *State*, 174 Ark. 733;

Jones v. *State*, 181 Ark. 336;

Prather v. *State*, 191 Ark. 903, and

Cascio v. *State* (this case), Printed Record 142.

The first two cases were reversed by the Arkansas Supreme Court and the last two affirmed.

There is nothing in said Statute that offends against Amendment XIV, U. S. Constitution as contended by petitioner.

> "Courts are not authorized to strike down a law enacted by the General Assembly unless it appears that the law contravenes some provision of the constitution; and, in case of doubt as to the constitutionality of a statute, the doubt must be resolved in favor of the Validity of the Law."

Fugett v. *State*, 208 Ark. 979, 188 S.W. (2d) 641, and cases there cited;

Moore v. *Alexander*, 85 Ark. 171, 107 S.W. 395;

Wells Fargo & Co. v. *Crawford*, 63 Ark. 576, 40 S.W. 710, 37 L.R.A. 371;

Ex Parte Byles, 93 Ark. 612, 126 S.W. 94, 32 S. Ct. 836, 56 Law Ed. 1270;

St. L. I. M. & S. Ry. Co. v. *State*, 99 Ark. 1, 136 S.W. 938, Am. Cas. 1913B 141;

State v. *Chicago Mill & Lbr. Co.* 184 Ark. 1011, 45 S.W. (2d) 26;

Dozier v. *Ragsdale*, 186 Ark. 654, 55 S.W. (2d) 779.

II

Information Can Be Substituted for Grand Jury Indictment

Petitioner cites under this above heading Amendment 21, Arkansas Constitution, and Amendments 5 and 14, U. S. Constitution, in support of the contention that a person can not be charged by information when the offense is a felony.

This contention has been decided against petitioner both by the Arkansas Supreme Court and the Supreme Court of the United States.

Penton v. *State*, 194 Ark. 503, 109 S.W. (2d) 131;

Smith, et al v. *State*, 194 Ark. 1041, 110 S.W. (2d) 24;

Deatherage v. *State*, 194 Ark. 513;

Brockelhurst v. *State*, 195 Ark. 67, 111 S.W. (2d) 527;

Hurtado v. *California*, 110 U.S. 516, 28 Law Ed. 232, 4 S. Ct. 111;

Bollen v. *Nebraska*, 176 U.S. 83, 44 Law Ed. 382, 20 S. Ct. 287;

Gaines v. *Washington*, 277 U.S. 81, 72 Law Ed. 793, 48 S. Ct. 468.

III

Restriction of Petitioner's Rights in Jury Selection, Not Unconstitutional

There could be no possible violation of any constitutional right of the petitioner in refusing to allow him to excuse two jurors formerly accepted, without any reason therefor and after the State had exhausted its peremptory challenges. The trial Court is given discretion in such matters and there must be shown an abuse thereof before any relief is granted. There has been no such abuse shown and in reality the record abundantly supports the ruling of the trial court.

Allen v. *State*, 70 Ark. 337, 68 S.W. 28;

Jones v. *State*, 166 Ark. 290, 265 S.W. 974;

Brust v. *State*, 153 Ark. 348, 240 S.W. 1079;

IV

No Evidence of Petitioner's Guilt, and Directed Verdict of Acquittal Should Not Have Been Given as a Matter of Law

Here petitioner argues there was no evidence to support the verdict and sentence pronounced thereon and that since there was none, his constitutional rights were invaded. There was evidence to support the verdict and sentence pronounced.

The trial court properly (printed Record pages 123 to 126) and in line with the decision of the Arkansas Su-

preme Court in case of *Prather* v. *State*, 191 Ark. 903, instructed the jury. The jury passed upon the evidence in the light of these instructions and the Arkansas Supreme Court (printed Record 142) affirmed the case holding the evidence was sufficient and met the test prescribed an dfollowed in weighing evidence upon appeal from the verdict of a jury to the Supreme Court of the State.

It might assist the Court here to state the rule and give citation of a few of the multitude of cases supporting it.

> "On appeal, the testimony will be viewed in the light most favorable to the State.
>
> The Jury's verdict, when supported by substantial evidence, is binding on appeal."

Coffer v. *State*, 211 Ark. 1010, 204 S.W. (2d) 376;

Brown v. *State*, 208 Ark. 180, 185 S.W. (2d) 274;

Reynolds v. *State*, 211 Ark. 383, 200 S.W. (2d) 806;

Benson v. *State*, 212 Ark. 905, 208 S.W. (2d) 767;

Duty v. *State*, 212 Ark. 890, 208 S.W. (2d) 162.

v

Prosecuting Attorney's Argument Does Not Make Trial Unfair

The testimony of witnesses for the State was credible and the Statement of the Prosecuting Attorney was true and justifiable.

Ingle v. *State*, 198 S.W. (2d) 996.

However, when his statement was objected to, the Court told the jury not to consider it.

There could then be no constitutional violation here of any rights of petitioner.

Moreover, broad discretion is given trial judges in the control of arguments and the Arkansas Supreme Court found, in this case, no abuse of that discretion.

Wilson v. *State*, 126 Ark. 354, 190 S.W. 441;

Walker v. *State*, 138 Ark. 517, 212 S.W. 319;

Rosslat v. *State*, 162 Ark. 340, 258 S.W. 348;

Kelley v. *State*, 175 Ark. 1170, 1 S.W. (2d) 46;

Hicks v. *State*, 193 Ark. 46, 97 S.W. (2d) 900;

Holcomb v. *State*, 203 Ark. 640, 158 S.W. (2d) 471.

CONCLUSION

We do not think and so contend that there was or is any violation of any constitutional right of the petitioner and that he did not have a fair and impartial trial. No Federal question is here presented and no ground for the issuance of a writ of Certiorari to the Supreme Court of the State of Arkansas. We respectfully ask that the prayer of the petition be disallowed.

Respectfully submitted

GUY E. WILLIAMS

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Attorneys for Respondent,
The State of Arkansas